Osaka Resources Sdn Bhd & Ors v Foo Holdings Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS A-02–2893–12 OF 2012 AND A-02–2971–12 OF 2012
LIM YEE LAN, ZAWAWI SALLEH AND HAMID SULTAN JJCA
8 NOVEMBER 2013

Civil Procedure — Appeal — Consolidation — Dispute on joint venture agreements entered — Assignment — Whether agreements valid and enforceable — Whether issue of locus and relief could be saved when suits have been consolidated — Purpose of consolidation — Whether would affect identity or existence of cases consolidated — Courts of Judicature Act 1964 s 60

The first and second appellants entered into two joint venture agreements as developer to develop four pieces of land. Three lots were in the name of the respondent and one lot ('the fourth lot') was in the name of the deceased. The respondent was the beneficial owner of the said lots notwithstanding the fact that part of the said lot was a subject matter of an acquisition even before the two joint venture agreements were executed and separate title had been subsequently issued in respect of the fourth lot albeit with a lesser area. The two joint venture agreements were assigned to the third appellant by the first and second appellants with notice to the respondent. After having assigned the two agreements, the two appellants without any locus in law in respect of both the joint venture filed an application, seeking a declaration that the first agreement between the first plaintiff and the defendant was valid and enforceable; a declaration that the letter of termination of the first agreement by the defendant was invalid and illegal; specific performance of the first joint venture agreement. Subsequently, the respondent in this appeal filed an application, naming the third appellant only as the sixth defendant in the suit, seeking a declaration that the first defendant had ceased to be a director of the plaintiff and had no authority to act or hold himself as a director of the plaintiff; a declaration that the second and third defendants ceased to be the directors of the plaintiff; and an injunction restraining the first, second and third defendants from acting or holding themselves out as directors of the plaintiffs and from otherwise, meddling in the plaintiff's business or the management of its affairs. Both the suits were consolidated by an order of the High Court. It was argued by the appellants that the locus issue as well as the issue of relief could be saved by the fact that the suits have been consolidated and all parties were before the court and suitable orders could be made to save the appellants' appeal pursuant to s 60 of the Courts of Judicature Act 1964.

Held, dismissing the appeals with costs:

(1) The main purpose of consolidation was to save costs, time and effort, and

to make the conduct of several actions more convenient by treating them as one action. It was not a process to improve the pleadings or prayers or to borrow or adopt the prayers of one party to the advantage of the other. A consolidation order would not affect the identity or the existence of the cases that have been consolidated, or the status of the parties to the suits nor would it affect the pleadings (see paras 11–12).

(2) It was not the function of the appellate court to make out a case or provide a relief which was not adverted to in the pleadings or new points to be raised and argued on the appeal when those points were not pleaded nor raised in the courts below unless the exception to the strict rule would apply (see para 13).

(3) The assignment was not like an assignment in relation to a facility to obtain a loan from the bank, where the assignor might have a right to redeem the property, and in consequence might have some locus to sue based on the underlying contract with the consent of the bank or if no consent was given to include the bank as a co-defendant and seek suitable declarations or orders or directions from the court against the bank to avoid any challenge as to the issue of locus (see para 15).

(4) This appeal related to findings of facts. As a general rule, a finding of facts of a trial court would rarely be disturbed by the appellate court more so when it related to physical facts. As long as the trial judge had directed his mind to the relevant issues, and had acted in accordance with the law and the decision passed the test of reasonableness, the finding of facts relating to physical facts would not be ordinarily disturbed notwithstanding that the judgment was brief and direct to the point (see para 28(b)).

[Bahasa Malaysia summary

Perayu-perayu pertama dan kedua memasuki dua perjanjian usahasama sebagai pemaju untuk membangunkan empat bidang tanah. Tiga lot adalah di dalam nama responden dan satu lot ('lot keempat') adalah di dalam nama si mati. Responden adalah benefisiari lot-lot tersebut tanpa mengambil kira fakta bahawa sebahagian lot tersebut adalah perkara pengambilan tanah walaupun sebelum kedua-dua perjanjian usahasama dilaksanakan dan hak milik berasingan telah kemudiannya dikeluarkan berkaitan lot keempat meskipun dengan kawasan yang lebih kurang. Kedua-dua perjanjian usahasama diletakhakkan kepada perayu ketiga oleh perayu-perayu pertama dan kedua dengan notis kepada responden. Selepas menyerahhakkan kedua-dua perjanjian, kedua-dua perayu tanpa apa-apa locus dalam undang-undang berkaitan kedua-dua usahasama memfailkan permohonan, memohon perisytiharan bahawa perjanjian pertama di antara plaintif pertama dan defendan adalah sah dan berkuat kuasa; perisytiharan bahawa surat penamatan perjanjian pertama oleh defendan adalah tidah sah dan salah dari segi undang-undang; pelaksanaan spesifik perjanjian usahasama pertama.

Kemudiannya, responden dalam rayuan ini memfailkan permohonan, menamakan perayu ketiga hanya sebagai defendan keenam dalam tindakan, memohon perisytiharan bahawa defendan pertama telah tamat menjadi pengarah plaintif dan tidak mempunyai kuasa untuk bertindak atau dirinya bertindak sebagai pengarah plaintif; perisytiharan bahawa defendan-defendan kedua dan ketiga tamat menjadi pengarah plaintif; dan injunksi menghalang defendan-defendan pertama, kedua dan ketiga daripada bertindak atau diri mereka bertindak sebagai pengarah plaintif-plaintif dan daripada masuk campur perniagaan plaintif atau pengurusan hal ehwalnya. Kedua-dua tindakan digabungkan oleh perintah Mahkamah Tinggi. Ia dihujahkan oleh perayu-perayu bahawa isu locus begitu juga isu relief boleh diselamatkan oleh fakta bahawa tindakan-tindakan tersebut telah digabungkan adan kesemua pihak di hadapan mahkamah dan perintah-perintah sesuai boleh dibuat untuk menyelamatkan rayuan perayu-perayu berikutan s 60 Akta Mahkamah Kehakiman 1964.

Diputuskan, menolak rayuan-rayuan dengan kos:

(1) Tujuan utama penggabungan adalah untuk menjimatkan kos, masa dan usaha, dan untuk membuat penggendalian beberapa tindakan lebih sesuai dengan membuatkannya sebagai satu tindakan. Ia bukan proses untuk memperbaiki pliding atau permohonan atau untuk meminjam atau menggunakan permohonan-permohonan satu pihak untuk kelebihan pihak satu lagi. Perintah penggabungan tidak menjejaskan identiti atau kewujudan kes-kes yang telah digabungkan, status pihak-pihak kepada tindakan juga tidak menjejaskan pliding (lihat perenggan 11–12).

(2) Ia bukan fungsi mahkamah rayuan untuk membuat kes atau memberikan relief yang tidak dirujuk di dalam pliding atau isu baru untuk dibangkitkan dan dihujahkan atas rayuan apabila isu-isu tersebut tidak diplidkan atau dibangkitkan di mahkamah bawah kecuali pengecualian kepada undang-undang ketat digunapakai (lihat perenggan 13).

(3) Pernyerahhakkan bukan penyerahhakkan berkaitan kepada kemudahan untuk mendapat pinjaman daripada bank, di mana penyerah hak mungkin mempunyai hak untuk menebus hartanah tersebut, dan akibatnya mungkin mempunyai locus untuk menyaman berdasarkan kontrak yang menjadi dasar dengan izin bank atau jika tiada izin diberikan untuk memasukkan bank sebagai defendan dan memohon perisytiharan sesuai atau perintah-perintah atau arahan-arahan daripada mahkamah terhadap bank untuk mengelak apa-apa cabaran terhadap isu (lihat perenggan 15).

(4) Rayuan ini berkaitan dapatan fakta. Sebagai peraturan am, dapatan fakta mahkamah perbicaraan akan jarang diusik oleh mahkamah rayuan lebih

lagi jika ia berkaitan fakta fizikal. Asalkan hakim perbicaraan telah mengarahkan mindanya kepada isu-isu relevan, dan bertindak mengikut undang-undang dan keputusan melepasi ujian kemunasabahan, dapatan fakta berkaitan fakta fizikal tidak secara biasanya diusik walaupun penghakiman tersebut adalah ringkas dan terus kepada isu (lihat perenggan 28(b)).]

Notes

For a case on consolidation, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) para 967.

Cases referred to

Bongsor Bina Sdn Bhd v Manzer Medical Sdn Bhd & Ors [2004] 7 MLJ 1, HC (refd)
Damusa Sdn Bhd v MRCB Prasarana Sdn Bhd [2012] 1 LNS 994, HC (refd)
Haji Abdul Ghani bin Ishak v PP [1980] 2 MLJ 196 (refd)
Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd [1989] 2 MLJ 149, SC (refd)
Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (folld)
KL Engineering Sdn Bhd & Anor v Arab Malaysian Finance Bhd [1994] 2 MLJ 201, SC (refd)
Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2013] 2 MLJ 650, CA (refd)
Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428, SC (refd)
London Passenger Transport Board v Moscrop [1942] 1 All ER 97, HL (refd)
Mok Swee Kok v PP [1994] 3 SLR 140, CA (refd)
Muniandy & Anor v Muhammad Abdul Kader & Ors [1989] 2 MLJ 416, SC (refd)
Neath Rugby Ltd No 2,Re [2009] 2 BCLC 427, CA (refd)
Ng Terk Chai v PP and other appeals [2013] 2 MLJ 375, CA (refd)
Norakhmar bt Baharom and Anor v Lee Ming Leong & Ors [2007] 8 MLJ 50, HC (refd)
Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268, FC (refd)
Phrueksa Taemchin(Thailand) v PP [2013] 6 MLJ 808; [2013] 5 AMR 338, CA (refd)
Pioneer Haven Sdn Bhd v Ho Hup Constructions Co Bhd & Anor and other appeals [2012] 3 MLJ 616; [2012] 5 CLJ 169, CA (refd)

Legislation referred to

Companies Act 1965 11(10), 132C, 154(1), 181, Form 49
Companies Act 2008 [UK] s 996
Courts of Judicature 1964 s 60
Evidence Act 1950 ss 74, 76, 77, 78
Federal Constitution art 8(1)
Rules of Court 2012 O 92 r 4

Rules of the Court of Appeal 1994 r 76
Specific Relief Act 1950
Supreme Court of Judicature Act (Cap 322) [SG] s 54(1)

Appeal from: Suit Nos 22–50 of 2004 and 22–254 of 2007 (High Court, Ipoh)

Cindy Goh Joo Seong (Loh Siew Cheang and Koh Kean Kang with him) (Cheang & Ariff) for the appellants.
Leong Kok Keong (Rabinder Singh and VS Viswanathan with him) (Kean Chye & Sivalingam) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] Two appeals came up for hearing on 1 October 2013. They are Appeals No A-02–2893–12 of 2012 filed by the three appellants in respect of Suit No 22–50 of 2004 and Suit No 22–254 of 2007 which we will refer to as the first appeal and Appeal No A-02–2871–12 of 2012 filed by two appellants in respect of Suit No 22–254 of 2007 which we will refer to as the second appeal. The grounds of judgment of the learned judge for the first appeal is dated 25 May 2012, and the second appeal is dated 31 March 2013.

[2] Parties to both the appeals have agreed that both appeals have some nexus to each other and in consequence with consent we heard both the appeals one after the other and agreed to deliver judgment for both the appeals, and reserved judgment on 8 November 2013. This is our judgment for both the appeals.

[3] We have dealt with both the appeals separately and the judgment will consist of two parts. The first part will deal with first appeal and the second part will deal with the second appeal.

FIRST APPEAL

[4] The first appeal is filed by the plaintiffs in Suit No 22–50 of 2004 (the first and second appellants) and the sixth defendant in Suit No 22–254 of 2007 (the third appellant).

BRIEF FACTS

[5] The first and second appellants entered into two joint venture agreements dated 6 June 2000 as developer to develop four pieces of land. Three lots were in the name of the respondent and one lot (fourth lot) was in the name of Chen Choi Thai (the deceased). There is no dispute that the

respondent was the beneficial owner of the said lots notwithstanding the fact that part of the said lot was a subject matter of an acquisition even before the two joint venture agreements were executed and separate title has been subsequently issued in respect of the fourth lot *albeit* with a lesser area.

[6] It must be noted that because the fourth lot was lesser in area and the fact that it was not in the name of the respondent, the learned trial judge took the position that the joint venture agreements will fail based on the jurisprudence of uncertainty notwithstanding the fact that it was not the pleaded case of the parties. On the factual matrix of the case, we are of the considered view the doctrine of uncertainty will not be triggered and we do not wish to deal with this issue as the appeal can be disposed of for other grounds patently available from the records.

ASSIGNMENT AND EXPIRY OF THE TWO JOINT VENTURE AGREEMENTS

[7] The two joint venture agreements were assigned to the third appellant, on 19 September 2002 by the first and second appellants with notice to the respondent. After having assigned the two agreements the two appellants without any locus in law in respect of both the joint venture had filed Suit No 22–50 of 2004 ie in the year 2004, seeking the following prayers namely:

(a) a declaration that the first agreement of 6 June 2000 between the first plaintiff and the defendant is valid and enforceable;

(b) a declaration that the letter of termination of the first agreement dated 15 January 2003 sent by the defendant is invalid and illegal;

(c) specific performance of the first joint venture agreement dated 6 June 2000;

(d) an order that the defendant do deliver the title deed to the lands held under Grant No 24015 Lot No 24884 and Grant No 24016 Lot No 24887, both in the Mukim Hulu Kinta, Daerah Kinta, Perak, to the first defendant (SIC) for their further action in compliance with the letter from the PTG dated 2 June 2003 and in accordance with the first joint venture agreement;

(e) specific performance of the second joint venture agreement dated 6 June 2000;

(f) an order that the defendant do deliver the title deed to the land held under Grant No 24017 Lot No 32314 in the Mukim Hulu Kinta, Daerah Kinta, Perak, to the second defendant (SIC) for their further action in compliance with the letter from the PTG dated 2 June 2003 and in accordance with the second joint venture agreements;

(g) damages pursuant to the Specific Relief Act;

(h) interest on damages at 8%pa;

(i) costs; and

(j) such further and/or other reliefs which this honourable court deems fit.

[8] Subsequently, the respondent in this appeal had filed Suit No 22–254 of 2007 naming the third appellant only as the sixth defendant in the suit. The prayers sought in Suit No 22–254 of 2007 reads as follows:

(a) a declaration that the first defendant has ceased to be a director of the plaintiff as of 7 May 2007 and has no authority to act or hold himself as a director of the plaintiff;

(b) a declaration that the second and third defendants have ceased to be the directors of the plaintiff as of 19 July 2007 and have no authority to act or to hold themselves out as directors of the plaintiff;

(c) an injunction restraining the first, second and third defendants from acting or holding themselves out as directors of the plaintiffs and from otherwise intermeddling in the plaintiff's business or the management of its affairs;

(d) an order that an injunction be granted to restrain all the defendants, their agents and/or representatives directly or indirectly from meddling or interfering or disturbing or instigating the other shareholders of the plaintiff to disturb or meddle into the management of the plaintiff's affairs in anyway howsoever which shall include an injunction to restrain all of them from filing any petition to wind up the plaintiff until the disposal of this suit;

(e) a declaration that the supplemental agreement dated 4 May 2007 entered into between the plaintiff and the sixth defendant is null and void;

(f) an injunction restraining the sixth defendant from further acting on the said supplemental agreement;

(g) an injunction restraining the sixth defendant from entering or remaining on all that land held under:

(i) Geran 24015 Lot 24884 Mukim Hulu Kinta, Daerah Kinta, Negeri Perak;

(ii) Geran 24016 Lot 24887 Mukim Hulu Kinta, Daerah Kinta, Negeri Perak;

(iii) Geran 24017 Lot 32314 Mukim Hulu Kinta, Daerah Kinta, Negeri Perak; and

(iv) Geran 48494 Lot 24886 Mukim Hulu Kinta, Daerah Kinta, Negeri Perak; A

(h) an order that the sixth defendant deliver vacant possession of all that land held under:

(i) Geran 24015 Lot 24884 Mukim Hulu Kinta, Daerah Kinta, Negeri Perak; B

(ii) Geran 24016 Lot 24887 Mukim Hulu Kinta, Daerah Kinta, Negeri Perak;

(iii) Geran 24017 Lot 32314 Mukim Hulu Kinta, Daerah Kinta, Negeri Perak; and C

(iv) Geran 48494 Lot 24886 Mukim Hulu Kinta, Daerah Kinta, Negeri Perak;

(i) an order that the first, third and sixth defendants and/or Messrs Tay Ibrahim and Partners do within 48 hours from the date of this order return the original titles held under Geran No 24015 Lot 24884 (formerly grant from Land 15053 Lot 24844), Geran 24016 Lot 24887, Geran 24017 Lot 32314 and Geran 48494 (formerly Certificate of Title 5502) Lot 24886 all in Mukim Hulu Kinta, Daerah Kinta, Negeri Perak Darul Ridzuan; or D E

(j) alternatively, the defendants do pay to the plaintiff special damages of RM13,092,200;

(k) general damages; F

(l) interest;

(m) costs; and

(n) any or further reliefs. G

[9] Both the suits were consolidated by the order of the High Court dated 3 December 2010 and it is pertinent to note the third appellant ie the sixth defendant did not have any counterclaim to adopt the prayers of the first and second appellants in Suit No 22–50 of 2004. It was argued by the learned counsel for the appellants, the locus issue as well as the issue of relief can be saved by the fact the suits have been consolidated and all parties are before the court and suitable orders can be made to save the appellants' appeal pursuant to s 60 of the Courts of Judicature Act 1964. And relied on cases which has no relevance to the factual matrix of our case. The cases are as follows: H I

(a) *Mok Swee Kok v Public Prosecutor* [1994] 3 SLR 140:
This case concerns the interpretation of s 54(1) of the Singapore Supreme Court of Judicature Act (Cap 322). The Singapore provision is similar to our s 60 of the CJA 1964. The Singapore Court of Appeal held:

> The phrase 'or may make such other order in the matter as it may think just' appears to us to be a distinct and independent phrase; and the power therein conferred unfettered by any qualification that might be thought to be introduced by the word 'thereupon'. The only restriction expressed is that 'such other order' as the appellate court chooses to make must in its opinion do justice.

(b) *Ng Terk Chai v Public Prosecutor and other appeals* [2013] 2 MLJ 375: This case concerns whether an appellate court can set aside the convictions and sentences of the court below. The Court of Appeal had this to say:

> It is appropriate to say that s 60 of the Courts of Judicature Act 1964 gives a wide power to the Court of Appeal to set aside the convictions and sentences passed by the learned High Court judge for the amended charge of robbery notwithstanding that all the three respondents merely appealed against their sentences and not against their convictions under the amended charge.

(c) *Re Neath Rugby Ltd No 2* [2009] 2 BCLC 427 — This case deals with statutory powers that confer discretion upon the court to 'make such order as it thinks fit'. This phrase appears in s 181 of the Companies Act 1965 as it appears in s 996 of the Companies Act 2008 (UK). The English Court of Appeal held to the effect that those words empowered the court to make such order as it thinks fit and not merely to make orders asked for by a litigant. Additionally, those words also empowered the court to make orders which a litigant did not ask for.

[10] We are of the considered view that the submission of the learned counsel is misconceived on the factual matrix of the case and judicial time must not be expanded to say why the argument is misconceived save to assert that s 60 was not enacted to as 'panacea' to cure all maladies in litigation based on 'palm tree' justice and/or jurisprudence.

[11] It is trite that the main purpose of consolidation is to save costs, time and effort, and to make the conduct of several actions more convenient by treating them as one action. It is not a process to improve the pleadings or prayers or to borrow or adopt the prayers of one party to the advantage of the other, etc. The proposition of law stated in respect of amendments to pleading in the case of *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 will equally apply to consolidated proceedings. Sharma J in that case asserted that:

> It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings.

[12] It is also well established that a consolidation order does not affect the identity or the existence of the cases that have been consolidated, or the status of the parties to the suits nor does it affect the pleadings, (see *Bongsor Bina Sdn Bhd v Manzer Medical Sdn Bhd & Ors* [2004] 7 MLJ 1). Consolidation order may bring all interested and necessary parties before the court but that does not necessarily mean short comings in the pleadings can be cured or improved without proper application for amendment.

[13] It is equally important to note that it is not the function of the appellate court to make out a case or provide a relief which was not adverted to in the pleadings or new points to be raised and argued on the appeal when those points were not pleaded nor raised in the courts below unless the exception to the strict rule applies, (see art 8(1) of the Federal Constitution and jurisprudence relating to procedural equality or fairness). For example, illegality or jurisdiction, etc (see *Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416; *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428). In *London Passenger Transport Board v Moscrop* [1942] 1 All ER 97, Lord Russell of Killowen opined that the Court of Appeal was not entitled to completely recast the plaintiff's alleged cause of action. Any departure from the cause of action alleged or the relief claimed in the pleadings should be preceded, or, at all events, accompanied, by the relevant amendments.

[14] The learned counsel for the appellants attempted to argue that all defects as to pleadings or relief can be cured pursuant to r 76 of the Rules of Court of Appeal 1994 which states:

> The Court shall exercise for all purposes incidental to or arising from any application or appeal, all the powers which, under the provisions of any written law in force in the place of trial at first instance, were vested in the trial Judge, whether before, during or after the trial, to the extent that such powers may be applicable to the circumstances of an application or appeal to the Court.

And O 92 r 4 of the Rules of Court 2012 which states:

> For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

The above submission lacks jurisprudence and is against weight of authorities which we had adumbrated earlier.

[15] In addition it must be noted that the assignment is not like an assignment in relation to a facility to obtain a loan from the bank, where the assignor may have a right to redeem the property, and in consequence may have some locus to sue based on the underlying contract with the consent of the bank or if no consent is given to include the bank as a co-defendant and seek

suitable declarations or orders or directions from the court against the bank to avoid any challenge as to the issue of locus (see *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268; *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149).

[16] The other reason why the appeal could not succeed based on the finding of facts of the learned judge is related to the supplementary agreement dated 4 May 2007 to both the joint venture agreement stated above signed by the third appellant purportedly with the respondent that too after the expiry of both the joint venture agreements. We say here 'purportedly' because the locus of the signatory to the supplementary agreement as well as the compliance of s 132C of the CA 1965 has been challenged by the respondent here as plaintiff in Suit No 22–254 of 2007 and the learned trial judge had favoured the respondent in this appeal as well as the second appeal which we think it was correctly done so on the factual matrix of the case and we are of the considered view that the learned trial judge's decision is correct on this issue and we will deal with this issue in some detail in the second part of our judgment, though we agree with the learned counsel for the appellant that s 132C of the CA 1965 will not be applicable to a joint venture agreement on the facts of this case as to developing the land is not a disposal within the meaning of s 132C of the CA 1965 and hence shareholders' approval is not required, (see *Pioneer Haven Sdn Bhd v Ho Hup Constructions Co Bhd & Anor and other appeals* [2012] 3 MLJ 616; [2012] 5 CLJ 169).

[17] We have read the appeal record and the submissions of the parties in detail. We are thankful to learned counsel for their comprehensive submissions on all issues and the enlightenment of law and jurisprudence. After having given much consideration to the submissions of the learned counsel for the appellant we take the view that the appeal must be dismissed with costs. Our reasons, inter alia, are as follows:

(a) the first and second appellants have no locus in the suit for reasons stated above;

(b) the supplementary agreement executed by the third appellant cannot be enforced for reasons stated by the learned trial judge and which we have adumbrated earlier, and agree with the learned trial judge on this issue, though the cogent reasons were stated in the judgment relating to the second appeal;

(c) in essence, this is a case of finding of facts, though some legal proposition may not have been correctly stated or dealt with. It is trite, notwithstanding the legal position is not correctly stated and the findings are vague, the apex court will rarely interfere in findings of facts and the decision of the trial judge, if the final decision is one where any reasonable tribunal properly appraised of the facts more so undisputed facts would

have come to the same conclusion (see *Phrueksa Taemchin(Thailand) v Public Prosecutor* [2013] 6 MLJ 808; [2013] 5 AMR 338). The said proposition to some extent has been given legal effect by the enactment of s 60 of the Courts of Judicature 1964; and

(d) the complaint of the appellants in the instant case is one relating to physical facts (see *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650). We have carefully examined the complaint in the memorandum of appeal and the judgment and evidence. We are satisfied that the conclusion reached by the learned judge passes the acid test of reasonableness and needs no appellate intervention, (see *Damusa Sdn Bhd v MRCB Prasarana Sdn Bhd* [2012] 1 LNS 994).

[18] For reasons stated above the first appeal is dismissed with costs.

[19] We hereby order so.

SECOND APPEAL (NO 02–2871–12 OF 2012)

[20] The factual matrix of the second appeal will clearly explain why the appellant in the first appeal was not favourably treated or the supplementary agreement was not honoured by the respondent of the first as well as second appeal ie Foo Holdings Sdn Bhd.

BRIEF FACTS

[21] Foo Holdings Sdn Bhd is a family company and the late Madam Chen Choi Thai had given the shares in the company to respective children who are the shareholders and relevant directors in the subject matter of the appeal. The parties to the dispute can be conveniently labelled as A team and B team. The appellants are from the A team and their complaint is that they were unlawfully removed as directors of the family company. The relevant exhibits, inter alia, to determine this issue are exhs 83 and D55.

[22] The learned trial judge had, inter alia, considered the relevant facts and had come to the conclusion to favour the B team and their directors. In addition it was also the finding of the learned judge that the supplementary agreement did not have the approval of all the shareholders. In consequence, the prayers sought by the company ie the respondent here found favour from the learned judge.

[23] What is interesting to note in this case is that it was vehemently argued by learned counsel for the appellants that exh D55 — Minutes of EGM of Foo

Holdings dated 7 May 2007, is bad in law on the ground that the chairman of the meeting was at the commencement of the meeting a member of the A team where the motions to remove the directors of the A team and appoint the director of B team by the B team was defeated. Subsequently, the chairman left the meeting and the minutes say one of the members of the B team continued with the meeting and declared himself as chairman and the motions which were defeated earlier were approved. The learned counsel did not submit any authorities for the proposition though common sense will dictate there may be merit in the argument and we do not wish to deal with it for reasons stated below.

[24] Subsequent to the motion, the B team had filed with Suruhanjaya Syarikat Malaysia ('SSM') the new status of the directors pursuant to s 154(1) of the Companies Act 1965 ('CA') within 30 days. This is not in dispute and no attempt according to law was attempted to rectify the record with SSM by the A team or counterclaim raised by the A team in Suit No 22–254 of 2007 itself, giving little choice for the learned trial judge to look into the complaint relating to exh D55, as the law requires prima facie to acknowledge Form 49 of the CA 1965 (see *KL Engineering Sdn Bhd & Anor v Arab Malaysian Finance Bhd* [1994] 2 MLJ 201). That does not mean Form 49 usually filed by persons who have controlled over the company cannot be challenged in collateral proceedings or otherwise.

[25] The learned counsel for the respondent in reliance of s 11(10) of the CA 1965 and the case of *Norakhmar bt Baharom and Anor v Lee Ming Leong & Ors* [2007] 8 MLJ 50 attempted to argue that any person aggrieved by the decision of the registrar of companies should within 30 days apply to the court to challenge the decision of the registrar and that was not done by the appellant and in consequence is fatal. Section 11(10) of the CA 1965 reads as follows:

> Any person aggrieved by the refusal of the Registrar to register any corporation or to register or receive any document or by any act or decision of the Registrar may appeal within thirty days of the decision of the Registrar to the Court which may confirm the refusal, act or decision or give such directions in the matter as seem proper or otherwise determine the matter but this subsection shall not apply to any act decision of the Registrar —
>
> (a) in respect of which any provision in the nature of the appeal or review is expressly provided in this Act; or
>
> (b) which is declared by this Act to be conclusive or final or is embodied in any document declared by this Act to be conclusive evidence of any act, matter or thing.

We do not think it is a right proposition in relation to the instant case as there was no decision of the registrar to attract s 11(10) of the CA 1965 as the filing was done by the company. The court is empowered to rectify the record with

the company registry if proper application to the court is made by any interested person including a minority shareholder who would not be in a position or authorised to file forms to rectify records in company registry.

[26] However, we agree with the learned counsel for the respondent that since no attempt was made by the appellant to obtain suitable order to rectify records in the company registry, what was stated in Form 49 must be accepted as evidence, as it will fall within the meaning of public document as stated in s 74 of the Evidence Act 1950 (see *Haji Abdul Ghani bin Ishak v Public Prosecutor* [1980] 2 MLJ 196). Section 74 of the EA 1950 states as follows:

> 74 The following documents are public documents:
>
> (a) documents forming the acts or records of the acts of —
>
> (i) sovereign authority;
>
> (ii) official bodies and tribunals; and
>
> (iii) public officers, legislative, judicial and executive, whether Federal or State or of any other part of the Commonwealth or of a foreign country; and
>
> (b) public records kept in Malaysia of private documents.

[27] This section defines what documents are public documents. However, this section does not deal with the mode of proving public documents. The mode of proof of the contents of public document is set out in ss 76–78 of the Act. In the instant case the issue of admissibility was not in issue or argued before us and in consequence the learned judge could not be faulted in the finding.

[28] We have read the appeal records, memorandum of appeal and the submissions of the parties in detail. We are grateful to the learned counsel. After having given much consideration to the submissions of the learned counsel for the appellant, we take the view the appeal must be dismissed. Our reasons, inter alia, are as follows:

(a) the learned trial judge had meticulously dealt with the relevant issues, taking into consideration the appellants themselves have failed to take necessary steps to rectify the records of which they are complaining;

(b) this appeal relates to findings of facts. As a general rule, a finding of facts of a trial court is rarely disturbed by the appellate court more so when it relates to physical facts. As long as the trial judge had directed his mind to the relevant issues, and had acted in accordance with the law and the decision passes the test of reasonableness, the finding of facts relating to physical facts will not be ordinarily disturbed notwithstanding that the

judgment is brief and direct to the point, (see *Damusa Sdn Bhd v MRCB Prasarana Sdn Bhd* [2012] 1 LNS 994); and

(c) we are satisfied that there are no appealable errors sufficient to invite appellate intervention.

[29] For reasons stated above the second appeal is dismissed with costs.

[30] We hereby order so.

Appeals dismissed with costs.

Reported by Afiq Mohamad Noor